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In the

Supreme Court of the United States

SOUTHWESTERN ILLINOIS DEVELOPMENT AUTHORITY,

Petitioner,

v.

NATIONAL CITY ENVIRONMENTAL, L.L.C. AND ST. LOUIS AUTO SHREDDING COMPANY,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF *AMICUS CURIAE* THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Did the Illinois Supreme Court, in ruling that petitioner's exercise of eminent domain was unconstitutional, disregard the holdings in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), and *Berman v. Parker*, 348 U.S. 26 (1954), and create a conflict with decisions in many other states, (a) by improperly substituting its judgment for that of the legislature in determining that the proposed use of the condemned property after the taking was not a public use; (b) by holding that the use of property taken by eminent domain is not a public use unless after the taking the general public has the use or enjoyment of the property as of right; and (c) by holding that a taking of property for economic redevelopment is unconstitutional if private business will earn a profit from the post-taking use of the property?

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INTEREST OF THE *AMICUS CURIAE*

The International Municipal Lawyers Association (IMLA) is a non-profit, professional organization that has been an advocate and resource for local government attorneys since 1935. IMLA has more than 1400 members and is this nation's oldest and largest professional organization for municipal attorneys. IMLA acts as the legal voice for this nation's local governments. It is the only organization on the national level devoted exclusively to the needs of the local government legal community. Its mission is to serve local government lawyers and advance the interests of local government law. To this end, it actively pursues the development of fair and realistic legal solutions to the problems that constantly confront our cities, towns and villages. IMLA publishes a number of materials and newsletters designed to help municipal lawyers, including the *Municipal Lawyer*, a magazine comprised of topical articles on municipal law and practice.[1]

SUMMARY OF THE ARGUMENT

The issues presented to the Court in this case go to the heart of municipal law as they concern the limits of power of government to take property from one private landowner and transfer it to another private owner in order to promote the public good through economic development. These issues affect every municipal attorney and municipality in the United States. While there is no question that there are constitutional limits on the power of local governments to

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[1] Monetary contributions were made to facilitate the preparation of this Brief by Madison County, Illinois, St. Clair County, Illinois and the City of Madison, Illinois. Both the Petitioner and the Respondent have consented to the filing of this Amicus Brief and their consents have been filed herewith.

take property in this manner, there is similarly no question that the powers of local governments to condemn private property for public use have been greatly expanded to allow condemnation of private property for use by another private party where the purpose of the taking achieves a valid public purpose. The case before the Court contains facts that squarely present the issues and provides the Court an opportunity to clarify and resolve the question of whether the Public Use Clause of the Fifth Amendment allows government to condemn private property for economic development when the property is transferred to another private party.

The taking of property from one private property owner and transferring it to another presents an important Constitutional question on the scope of governmental power in eminent domain. This case has caught the attention of the media and legal scholars, with one set of writers stating, "Perhaps no case has presented as extensive an examination of eminent domain to promote private economic interests as the judicial rollercoaster known as *Southwestern Illinois Development Authority v. National City Environmental, L.L.C.* The case presented a law school examination question of the limits of eminent domain." Timothy S. Hollister & Amy E. Souchuns, "*Eminent Domain and Condemnation, How Far Is Too Far?*" Address Before International Municipal Lawyers Association 2002 Mid-Year Seminar, April 23, 2002 at 16-19. *See also* THE WALL STREET JOURNAL, Apr. 5, 2002, at B2; THE WALL STREET JOURNAL, July 23, 2001, at B1.

Municipal attorneys have come to rely on this Court's rulings, which have widely been interpreted as providing a broad-based spectrum of permissible public purposes that justify and permit eminent domain powers, including the power to take private property from one person and convey it to another to accomplish the goals sought. *Berman v.*

Parker, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 (1954); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 104 S.Ct. 2321, 81 L.Ed.2d 186 (1984). This Court established that it is the legislature's duty to determine what constitutes a public purpose and it is not the role of the judiciary to substitute its view for that of the legislature. The Illinois court's ruling in this case calls into question, not only the role of the judiciary in reviewing takings cases, but what public purposes will satisfy constitutional requirements in order to provide a valid basis for condemnations in the future. This is a major concern for all local government attorneys because the Illinois court's decision has created uncertainty. It is no longer clear to what extent the Public Use Clause of the Fifth Amendment restricts the exercise of the government's eminent domain power.

Surely it is an anachronistic view to equate public use with a requirement for free access for all members of the public. Yet, that seems to be the road some state courts are following. This is despite the fact that this Court has previously determined that economic redevelopment is a valid public purpose that satisfies the Public Use Clause requirement and that taking property from one private landowner and conveying it to another in order to alleviate blighted neighborhoods is permitted. *Berman*, 348 U.S. 26. The question is, should eminent domain powers used for redevelopment and development policies be limited strictly to cases involving slums and blighted areas? The *amicus* submits that the precedent set by this Court does not warrant such a narrow view. Public purposes can be achieved through other developmental goals in areas that are not blighted.

This issue is of great concern to all units of local governments because the Illinois decision, if followed, will handcuff local officials, and prevent them from condemning property for economic redevelopment when such develop-

ment is to be accomplished primarily by private enterprise. Having private enterprise assist in redevelopment projects is often the only way a redevelopment project can be accomplished. It is self-evident that when private enterprise is used the public coffers are preserved, which is a benefit in itself. Moreover, this Court has found that once the public purpose has been established the means of executing the project are for the legislature alone to determine. *Berman*, 348 U.S. 26, 33.

The state court decision conflicts with the precedent of this Court, and many other state courts, by placing unwarranted restrictions on the Public Use Clause for takings conducted to facilitate economic development projects. If the state court decision is allowed to stand, local governmental entities will face general confusion and indecision regarding their ability to advance economic development projects through condemnation proceedings. Accordingly, municipal governments have a substantial interest in the proper resolution of the important federal question that is presented in the petition. This Court should grant review.

ARGUMENT

I. THE LEGISLATIVE DETERMINATION OF PUBLIC USE IS ENTITLED TO GREAT DEFERENCE.

In *Berman v. Parker*, 348 U.S. 26 (1954), the Court set forth the role of the judiciary in reviewing a legislature's public use determination. The *Berman* Court acknowledged that the courts play a role in determining whether eminent domain power is exercised for a public purpose, but made clear that the judiciary's role is "an extremely narrow one . . . (and that) deference to the legislature's 'public use' determination is required until it is shown to involve an impossibility". *Berman*, 348 U.S. at 32. The Court made clear that once the legislature's public use determination is

made, the means by which that public use will be attained is also within the legislature's discretion, and it is not within the role of the judiciary to substitute its judgment for that of the legislature. *Berman*, 348 U.S. at 33-34.

This Court in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), expounded upon *Berman's* limitations on the judiciary, stating that "[a]ny departure from this judicial restraint would result in courts deciding on what is and is not a governmental function and in their invalidating legislation on the basis of their view on that question at the moment of decision, a practice which has proved impracticable in other fields." *Midkiff*, 467 U.S. at 240-41, *quoting United States ex rel. TVA v. Welch,* 327 U.S. 546, 552 (1946). The *Midkiff* Court observed that as long as the exercise of eminent domain power is rationally related to a conceivable public purpose, the Court has never held that a compensated taking violated the Public Use Clause. *Midkiff*, 467 U.S. at 240-41. In short, the Court has made it clear that it will not substitute its judgment for a legislature's judgment as to what constitutes a public use, "unless the use be palpably without reasonable foundation." *Id.*, *citing United States v. Gettysburg Electric R. Co.*, 170 U.S. 668, 680 (1896).

The enabling act in the instant case created petitioner, Southwestern Illinois Development Authority (SWIDA), and empowered it to promote commercial, residential, service, transportation, and recreational activities and facilities. 70 ILCS 520/2(g) (A-114). SWIDA was authorized by the act to promote development projects, including for-profit racetracks and parking facilities. 70 ILCS 520/3(j) (A-116); 720 ILCS 520/5 (A-117). In the instant case, the state legislature made a public use determination that development would reduce unemployment and enhance the public welfare of the region. 70 ILCS 520/2(g) (A-114). Subsequently, SWIDA determined there were substantial rea-

sons to exercise its taking power to condemn respondent's property for use as a parking facility at an auto racetrack. (A-20). This being done, the Illinois Supreme Court was bound to defer to the legislative determination that the taking was to serve a public use. *See Midkiff*, 467 U.S. at 244. By refusing to defer to the legislature's public use determination, the Illinois Supreme Court's decision directly conflicts with prior decisions of this Court, including *Berman* and *Midkiff*

The Illinois Supreme Court acknowledged that the particular taking would benefit the public by alleviating traffic and addressing public safety concerns. (A-13) The state court also recognized the taking could contribute to positive economic growth in the region. (A-13-14) Despite recognizing the public purpose in this case, the Illinois Supreme Court nevertheless determined that the taking violated the Public Use Clause. In doing so, the state court incorrectly interpreted, or otherwise rejected, prior decisions of this Court.

The court's intrusion into the legislative domain in this case signals an erosion of eminent domain powers that, if upheld, could result in courts operating as regional planning boards free to substitute their own decision of what the best manner for development should be. Evidence would then be necessary in every case to prove that the government's plan for development is economically better than some alternative plan. This would result in time-consuming litigation, which would only serve to impede the objectives sought in the redevelopment. As noted above, this is a practice which this Court has determined "has proved impracticable. . ." *Midkiff*, 467 U.S. at 240-41.

It is also significant that the Illinois court did not expressly challenge the valid public purpose associated with the racetrack itself, but instead confined its review to the public benefits of the parcel taken for use as a parking lot.

Indeed, the economic development benefits to the area of the racetrack in the three years it had been operating had been substantial, and economic development had clearly been achieved through the development. As one set of commentators put it, ". . . if the initial development of the Gateway racetrack *per se* was a legitimate authority for SWIDA, why not also additional parking?" *See* Timothy S. Hollister & Amy E. Souchuns, *"Eminent Domain and Condemnation, How Far Is Too Far?,"* Address Before International Municipal Lawyers Association 2002 Mid-Year Seminar, April 23, 2002 at 16-19. If courts are allowed to scrutinize each individual parcel taken in a multi-parcel project to determine whether the public use is promoted by that taking alone, the process will not only become unwieldy and unmanageable, the objectives of the project as a whole will be lost.

This type of analysis should not be condoned, as this Court pointed out in *Berman*, 348 U.S. at 35, when it found that an individual parcel of property that was not itself "blighted" could be condemned in order to develop a project to alleviate blight in the area. That is a matter that should be determined by the legislature not the judiciary. This principle has become blurred. That is why it is important for the Court to grant the Petition For Certiorari in this case.

II. THE STATE COURT'S DECISION IS IN DIRECT CONFLICT WITH THE DECISIONS OF THIS COURT BECAUSE IT ADDS A REQUIREMENT TO THE PUBLIC USE ANALYSIS THAT THIS COURT HAS EXPRESSLY REJECTED.

The decision of the Illinois Supreme Court grafts onto the public use doctrine the requirement that a condemned property must be put into free use for the public. In its opinion, the Illinois Supreme Court relied on a 1903 case in

holding that "[t]he public must be to some extent entitled to use or enjoy the [condemned] property, not as a mere favor or by permission of the owner, but by right." (A-13). Based on this requirement, the Illinois Supreme Court determined that the subject taking violated the Public Use Clause because the public did not have the right to use the condemned property since they would be forced to pay a parking fee. *Id.* at 238.

By requiring that the public have a right to free use of condemned property, the Illinois Supreme Court's decision directly conflicts with the decision of this Court in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229. In *Midkiff*, the Court stated that it had "long ago rejected any literal requirement that condemned property be put into use for the general public." *Midkiff*, 467 U.S. at 244. The Court stated further that "[i]t is not essential that the entire community, nor even any considerable portion, . . . directly enjoy or participate in any improvement in order [for it] to constitute a public use." *Midkiff*, 467 U.S. at 244, quoting *Rindge Co. v. Los Angeles*, 262 U.S. 700, 707 (1923).

There is no requirement that the public, or even the government, use condemned property to legitimize a taking. Rather, it is only the taking's purpose, and not the mechanics of the taking, which must pass scrutiny under the Public Use Clause. *Midkiff*, 467 U.S. at 244. Accordingly, the decision of the Illinois Supreme Court directly conflicts with the decision of this Court.

III. THE ILLINOIS SUPREME COURT'S PUBLIC USE DOCTRINE, ALREADY CITED BY ONE COURT AS THE "NATIONAL TREND," ILLUSTRATES THE CONFLICT AMONG THE STATES IN THE APPLICATION OF *BERMAN* AND *MIDKIFF*.

The Illinois Supreme Court acknowledged that the subject taking could result, in addition to other public benefits,

in increased revenues to the region. (A-14). Notwithstanding this finding, the state court determined that the public benefit of revenue expansion did not justify the use of eminent domain power in the instant case. *Id.* Specifically, the state court found the taking an "improper and unacceptable expansion of the eminent domain power of the government." *Id.*

A review of the judicial construction of the Public Use Clause demonstrates that the use of eminent domain powers to expand revenues and spur other economic development is indeed proper. This Court in *Berman*, upheld the condemnation of a non-blighted property for the purposes of redeveloping the larger area. *Berman*, 348 U.S. at 34-36. As the *Berman* Court stated regarding the public use requirement, "[t]he concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as *monetary*. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, *well-balanced* as well as carefully patrolled." *Berman*, 348 U.S. at 33 (emphasis added).

Other state high courts have come to the same conclusion. For example, in *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 629, 304 N.W.2d 455, 457 (1981), the Michigan Supreme Court reviewed the use of eminent domain to acquire and convey property to General Motors Corporation for construction of an automobile assembly plant. The eminent domain power authority was exercised pursuant to the Michigan Economic Development Corporations Act, a statute similar to that at issue in *Berman*. The Act declared that:

> There exists in this state the continuing need for programs to alleviate and prevent conditions of unemployment, and the legislature finds that it is accordingly necessary to assist and retain local in-

> dustrial and commercial enterprises, including employee-owned corporations, to strengthen and revitalize the economy of this state and its municipalities . . . therefore, the powers granted in the act constitute the performance of essential public purposes and functions for this state and its municipalities. Mich Comp. L. Ann Sec. 125.1602.

In upholding the condemnation, the Michigan Supreme Court deferred to the state legislature's public use determination that the public would be the primary beneficiary of the condemnation because it would promote economic development, reasoning that "the most important consideration in the case of eminent domain is the necessity of accomplishing some public good which is otherwise impracticable, and . . . the law does not so much regard the means as the need." *Poletown*, 410 Mich. at 634-35, 304 N.W.2d at 459-60.

In addressing the meaning of the "public use", the court indicated that a "public use changes with changing economic conditions of society and that the right of the public to receive and enjoy the benefit of the use determines whether the use is public or private." *Poletown*, 410 Mich. 616 at 619, 304 N.W.2d at 457. The court concluded that in order to promote the general economic welfare of the people, the municipal taking of private property of some to provide land for the future development and expansion of General Motor's manufacturing facility was a valid exercise of the power of eminent domain. The court ruled based on its understanding of *Berman,* and other state precedents, in equating public use with public benefit and in ruling that "the determination of what constitutes a public purpose is primarily a legislative function". *Id.* at 459.

The facts in *Poletown* are similar to those in the Illinois case in that the legislatures made a determination of a valid public purpose, and both determined the need for

economic development by the private sector as a means to improving the economic conditions in the areas in question. If anything, the facts in *Poletown* indicate a use that was more private than that in the Illinois case. In the latter the public benefited by economic revitalization as well as the provision of entertainment and recreational facilities, namely, a racetrack, to which they were invited to come and view automobile races. The decisions of the court could not, however, be more divided. The Michigan court adopted this Court's view as stated in *Berman*, that when a legislature speaks, the public interest has been declared in terms, "well-nigh conclusive." 304 N.W.2d at 459, citing *Berman*, 348 U.S. 26, at 32. The Illinois court found the condemnation to be for the benefit of private interests. Clearly there is a split of authority on this issue that needs to be resolved.

Since *Poletown*, other courts have held that eminent domain may be used to aid private businesses where a larger public purpose is served. In *Blanchard v. Department of Transportation*, 798 A.2d 1119, 2002 ME 96 (2002) the Maine Supreme Court upheld the taking of property for a parking lot. The Maine case is noteworthy because the dissent in *Blanchard* cited the Illinois Supreme Court's decision in this case as representative of a trend of courts to increasingly scrutinize the use of eminent domain powers.

In *Blanchard*, the Department acquired 1.4 acres of land from Blanchard by eminent domain for use as a parking lot for ferry users traveling to and from Chebeague Island. Prior to the taking, Blanchard had leased the lot to the Chebeague Transportation Company (the "Ferry"), a for-profit corporation. The lot lease was set to terminate on January 1, 2000. After conducting extensive studies, the Department concluded that the existing facility on Cousins Island was the only feasible location for the ferry landing

and that the availability of parking on Cousins Island adjacent to the wharf was essential for the operation of the ferry transportation system. The Department acquired the lot in order to ensure that the Blanchard lot would continue to be available for parking once the lease expired. Following the taking, the Department leased the land to the Town for its continued operation as a parking lot. The Town then subleased the parking lot to the Ferry. Blanchard argued that the taking was unconstitutional because the parking lot was not freely accessible by all members of the public and therefore the property was not taken for a public use. Blanchard argued further that the fact that the lot was being leased to and managed by the Ferry, a privately owned company, meant that the use was private because the public did not have access to the lot as a matter of right.

The Maine Supreme Court upheld the taking as meeting the public use test, finding that it was for a public purpose because it supported a transportation system that was open to all members of the public. It also found that the restrictions placed on the lease ensured that the use would remain open to the public. The dissenting opinion did not agree that there was a public purpose for the taking. The dissent stated, "Courts across the country are increasingly scrutinizing the use of eminent domain to ensure that property is not taken for private purposes." *Id.* at 1129, citing the Illinois Supreme Court's opinion in this case. The dissent went on to cite this Court's decision in *Midkiff* for the proposition that, "Property cannot be taken from one private individual solely for the benefit of another private individual." *Id.* at 1130, quoting *Midkiff* 467 U.S. at 245.

The Maine case illustrates the confusion that exists on the application of the precedent set by this Court. It also illustrates the impact the Illinois Supreme Court's decision has already had on one court and foreshadows the impact that it will have on other courts.

In *Minneapolis Community Development Agency (MCDA) v. Opus Northwest, LLC.*, 582 N.W.2d 596 (1998), MCDA condemned private property in downtown Minneapolis for conveyance to and redevelopment by another private party pursuant to legislation that provided for eminent domain in order to provide employment opportunities, to improve the tax base, and to improve the general economy of the state. Minn. Stat. 469.124. Evidence was presented that the taking would provide more parking, increased employment, increased tax base and furtherance of the city's objective of creating an economically viable retail corridor between downtown businesses. *MCDA,* 582 N.W.2d at 599. The court determined that a finding of a public purpose was consistent with the authority granted by the legislature. In so finding, the court rejected a claim for "heightened scrutiny" in any condemnation that benefits private interests, stating that such an application was ". . . out of touch with the national trend, . . . [which is] to 'sanction broad legislative discretion to use eminent domain for a variety of economic development purposes'." *Id.*, *quoting* 2A Nichols on Eminent Domain.

In another state court case, the Missouri Court of Appeals upheld the condemnation of property adjacent to the Kansas City International Airport, which was to be leased to private business for commercial development. *City of Kansas City v. Hon*, 972 S.W.2d 407, 408 (Mo. Ct. App. 1998). Condemnation powers were utilized in order to prevent property owners from making future airport expansion more difficult or expensive. *Id.* at 410. On review, the appellate court upheld the legislature's public use determination, finding that there was a legitimate public benefit in creating jobs and assisting the airport to become self-sustaining. *Id.* In coming to its conclusion, the appellate court found no distinction between the use of condemnation to remove blight versus its use to promote economic development. *Id.* at 414.

The use of eminent domain powers for projects similar to the one at issue, that is, racetracks and sports stadiums, has long been upheld by other courts of review. Arguably, none of these projects would have been built without the use of eminent domain for public redevelopment. *See Mid-America Pipeline Co. v. Lario Ents.*, 716 F. Supp. 511, 517 (D. Kan. 1989) (auto racetrack); *City of Anaheim v. Michel*, 66 Cal. Rptr. 543 (Cal. App. Ct. 1968) (California Angels baseball stadium); *State v. Daytona Beach Racing & Recreational Facilities Dist.*, 89 So. 2d 34, 37 (Fla. 1956) (auto racetrack); *State ex rel. Tomasic v. Unified Gov't of Wyandotte County/Kansas City*, 962 P.2d 543, 554 (Kan. 1998) (auto racetrack); *Kelly v. Marylanders for Sports Sanity, Inc.*, 530 A.2d 245 (Md. Ct. App. 1987) (Camden Yards baseball stadium); *Land Clearance for Redevelopment Corp. v. Doernhoefer*, 389 S.W.2d 780 (Mo. 1965) (St. Louis Cardinals baseball stadium); *New Jersey Sports & Exposition Auth. v. McCrane*, 292 A.2d 580 (N.J. 1971) (football stadium); *G.P. Show Prods., Inc. v. Arlington Sports Facilities Dev. Auth.*, 873 S.W.2d 120 (Tex. Ct. App. 1994) (Texas Rangers baseball stadium); *King County v. Taxpayers of King County*, 949 P.2d 1260 (Wash. 1997) (baseball and football stadium).

IV. "PUBLIC USE" IS AN ELASTIC CONCEPT.

The meaning of "public use" is broad and elastic and the judiciary has given wide discretion to legislatures to take land for a variety of public uses. 2A Nichols on Eminent Domain (3d ed. 2002). These uses do not seem limited to a narrow conception of traditional governmental functions, but, as stated in *Berman* and *Midkiff*, are coterminous with the scope of a state's police power. This indicates that as local needs evolve, so does the apparent scope of the meaning of how a valid "public use" is defined. *Id.* Thus, while some may wish to place limitations on the use of eminent

domain to some narrowly defined public uses, this approach does not seem fruitful. *Id.*

When a legislative determination has been made that it is in the public interest to pursue redevelopment to enhance economic conditions, the power of eminent domain is often a power that is granted in order to accomplish those goals. There is no question that the public purposes for which eminent domain has been utilized has expanded in the last fifty years, due in large part to the decisions of this Court in *Berman* and *Midkiff*. There are now efforts to curtail the use of eminent domain for such projects and they come in the form of facially appealing arguments that seek to protect the sanctity of private property rights. These efforts often ignore the overall public purposes at stake and focus instead on a myopic view of the particular taking in question. The arguments in favor of retrenchment propound a shift in public policy making from the legislature to the judiciary. These efforts only serve to undermine certainty in the limits to which local governments can go to pursue economic development. If such efforts are successful it is quite likely that billions of dollars of redevelopment will be curtailed as a result of the uncertainty that is created. This is a result that is not warranted under existing law and can be prevented by review and clarification of these issues by the Court in this case.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

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